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November 5, 2002

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Test Claim 01-TC-22
San Juan Unified School District
Academic Performance Index

Dear Ms. Higashi:

I have received the comments of the Department of Finance ("DOF") dated October 7, 2002 to which I now respond on behalf of the test claimant. I have also received the comments of the California Department of Education ("CDE") dated August 7, 2002, to which I will also respond on behalf of the test claimant.

Although none of the objections generated by DOF and CDE are included in the statutory exceptions set forth in Government Code Section 17556, the objections stated additionally fail for the following reasons:

1. **The Comments of the DOF and CDE are Incompetent and Should be Excluded**

Test claimant objects to the Comments of the DOF and CDE, in total, as being legally incompetent and move that they be excluded from the record. Title 2, California Code of Regulations, Section 1183.02(d) requires that any:

> "...written response, opposition, or recommendations and supporting documentation shall be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge or information and belief."

The DOF and CDE comments do not comply with this essential requirement.

Furthermore, the test claimant objects to any and all assertions or representations of fact made in the responses [such as, "no current II/USP participant has been selected"] since DOF and CDE have failed to comply with Title 2, California Code of Regulations, Section 1183.02(c)(1) which requires:

> "If assertions or representations of fact are made (in a response), they must be supported by documentary evidence which shall be submitted with the state agency's response, opposition, or recommendations. All documentary evidence shall be authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so and must be based on the declarant's personal knowledge or information or belief."

Furthermore, these "hearsay" statements do not even come up to the level of hearsay or the type of evidence people rely upon in the conduct of serious affairs. The comments submitted by DOF and CDE, and any allegations of unsupported facts therein, should be excluded from the record.

2. The Test Claim Legislation and Regulations Create New Mandated Duties

A. Duties mandated by Education Code Section 52052 and Section 1032 of Title 5, California Code of Regulations relative to the Academic Performance Index.

The DOF first argues that local educational agencies ("LEAs") are not required to provide any information to the Superintendent of Public Instruction. Subdivision (d) of Section 1032 of the California Code of Regulations provides that a school's API shall be considered invalid if (1) the local LEA notifies the California Department of Education that there were adult testing regularities, (2) the LEA notifies the CDE that the API is not representative of the pupil population, or (3) the LEA notifies the CDE that the school has experienced a significant demographic change in pupil population. Taking DOF's argument at face value, any local LEA would be permitted to take no action, i.e., fail to disclose these deficiencies when they exist. Certainly, this cannot be the intent of the law.

The DOF next argues that LEA's receive apportionments to cover costs associated with the implementation of the STAR program. CDE joins in this argument. The test claim alleges costs subsequent to and over and above those required by the STAR program. Subdivision (j) of Section 1032 of the California Code of Regulations requires the CDE to publish on its website a report of STAR

testing and demographic data used in the calculation of the API. The subdivision then goes on to state the LEA *must notify* the CDE and the test publisher via e-mail or in writing whether there are errors in the testing or demographic data, the notification *must be received* within 30 days, and the LEA *must submit* all data corrections to the test publisher in writing or by e-mail within a time specified by the test publisher. The apportionments referred to by DOF refer to the costs of the STAR testing process. The costs alleged in this test claim relate to the additional, post testing, duties required to insure the accuracy of the API.

Finally the DOF argues that Education Code Section 52052(a) does not require LEAs to provide information to the CDE concerning attendance or graduation rates. Subdivision(a)(3)(B) of Section 52052(a) provides that, before including high school and attendance rates in the index, the Superintendent of Public Instruction shall determine the extent to which the data is currently reported and the accuracy of the data. The test claim alleges[1] only, that to the extent attendance rates and graduation rates are not available to the SDE, school districts shall respond to any requests from the SDE for this information. Subdivision (a)((3)(C) requires the Superintendent of Public Instruction to report to the Governor and the Legislature if he/she determines that accurate data is not available and recommend necessary action to implement an accurate reporting system. The test claim alleges[2] only, that when required by the Superintendent of Public Instruction, to provide him/her with data pertaining to the high school graduation and attendance rates. DOF apparently argues that LEAs are not required to cooperate with the Superintendent of Public Instruction when requested to implement insufficient data or correct incorrect data then available.

B. Duties mandated by Education Code Sections 52053 through 52055.51 relative to the Immediate Intervention/Underperforming School Program.

DOF argues that the "three cohorts of II/USP consist entirely of volunteers." DOF also argues that "State funding is provided for all of the activities listed". CDE argues that schools "are invited to apply for this award program" and that sufficient funds are provided. Both agencies are wrong on both counts.

Although the Immediate Intervention/Underperforming School Program was originally designed for 430 underperforming schools to "accept an invitation" to

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[1] At page 94, lines 14 through 22

[2] At Page 95, lines 1 through 3

participate, Education Code Section 52053, subdivision (j), provides that if fewer schools apply for participation than can be funded, the Superintendent of Public Instruction, with the approval of the SDE , shall "randomly select" the balance of schools. Education Code Section 52056.5 provides that a school that fails to meet annual state growth targets may, as determined by the Superintendent of Public Instruction with the approval of the SDE, be "subject to" the Immediate Intervention/Underperforming School Program. These schools are not "invitees", they are "draftees". Test claimant recognized these situations and alleges[3] a detailed list of new mandated duties "(F)or those schools who are required, pursuant to Education Code Sections 52053(j) and/or 52056.5, to participate in the Immediate Intervention/Underperforming School Program."

As to the funding issue, test claimant also alleges these duties exist "to the extent funding is unavailable or insufficient." It is also noted here, and ignored by DOF and CDE, that there is no funding provided to replace the matching implementation funds required by Education Code Section 52054.5

C. Duties mandated by Education Code Sections 44653 relative to the one-time Certificated Staff Performance Incentive Act required by Education Code Sections 44650 through 44654 and Title 5, California Code of Regulations, Section 1034.

The duties alleged by the test claimant beginning at page 97, line 9 through page 98, line 17, are all required by the one-time Certificated Staff Performance Incentive Act set forth in Education Code Sections 44650 through 44654 and Title 5, California Code of Regulations, Section 1034. DOF erroneously refers only to the implementing legislation as Chapter 71, Statutes of 2000. Test claimant must, therefore, assume that DOF has no objections to the duties generated by Education Code Sections 44650 through 44654 or Title 5, California Code of Regulations, Section 1034, and stands on the record as to these duties.

The Superintendent of Public Instruction argues that "participation is at the discretion of the school districts" and "allows the employer portion of salary-driven benefit costs to be recovered via the collective bargaining process at the district level". The "discretion of the school districts" argument is treated with other similar arguments in Section 3, below. The argument concerning the recovery of salary-driven benefit costs is without foundation. Education Code Section 44653 provides that upon receipt of an allocation, the governing board of the school

[3] Test Claim, at page 95, line 4 through page 97, line 8

district shall negotiate individual teacher and staff salary award amounts with the exclusive representative of the bargaining unit. The only thing that can be negotiated is the individual salary award amounts. This is further proven by the fact that, if the district and the union cannot reach an agreement, the allocation shall be divided among teachers and staff ratably.

D. Duties mandated by Chapter 71, Statutes of 2000, Section 40, and Title 5, California Code of Regulations, Section 1039, relative to the Academic Performance Index Schoolsite Employees Performance Bonus.

DOF argues that "LEAs are not required to apply for, or accept any awards associated with the API." CDE argues that schools are invited to apply for this award program and participation is discretionary. Again, both agencies are incorrect.

School districts do not apply for the Academic Performance Index Schoolsite Employees Performance Bonus program. Chapter 71, Statutes of 2000, Section 40, requires the Superintendent of Public Instruction to allocate the sums appropriated. As a condition of receiving an allocation, the school district is required to make a certification *upon request* of the Superintendent of Public Instruction. The CDE's argument that participation is discretionary must be that school districts can exercise discretion by refusing to reply to the Superintendent of Public Instruction's request. Once received, the school district must enter the awards in the employees' payroll records and distribute the money received. And, upon receipt, the school district is required by Title 5, California Code of Regulations, Section 1039, to consult with the school site governance team/school site council to decide the use of the awards. Nothing is discretionary.

E. Salary-driven benefit costs, including the employer's share of Medicare, Unemployment insurance and worker's compensation.

DOF argues that LEAs are not required to apply for, or accept any awards associated with the API and "(A)s such, an LEA that applies for or accepts award funding accepts responsibility for any higher level of service, which may be required..." CDE correctly notes that all eligible schools will receive the Governor's High Achieving Schools award without application but, unbelievably goes on to argue "(A)lthough school districts have the option of turning down these funds, this option was not explicitly stated to districts. Therefore, although not mandated, districts may have interpreted acceptance of the funds as being required."

DOF then points out that Chapter 734, Statutes of 2001, Section 83, requires school agency administrative costs and salary-driven benefit costs incurred as a result of implementation of Chapter 71, Statutes of 2000, Section 40 (the one-time Academic Performance Index Schoolsite Employees Performance Bonus) to be paid from the schoolsite portion of the bonus. Then, DOF makes the quantum leap to conclude that this later enacted legislation results in *all* activities specified in this claim to be nonreimbursable state mandates.

Notwithstanding, Section 1038 of Title 5, California Code of Regulations, after its January 8, 2002 amendment deleting reference to the Academic Performance Index Schoolsite Employees Performance Bonus, continues to state that the Governor's Performance Awards and the Certificated Staff Performance Incentive Act awards still shall not be subject to school district, county, or school indirect charges or other administrative charges. Therefore, salary-driven benefit costs, including the employer's share of Medicare, unemployment insurance and worker's compensation for these programs remain indirect costs that must be incurred by any school district upon receipt of these awards.

3. **School Districts have no reasonable alternative to the state scheme or no true choice but to participate in these programs.**

Recurring throughout the comments of the Department of Finance and the Department of Education is the argument that the various programs of the Public School Performance Accountability Program are discretionary programs. Both agencies repeatedly assert that the school districts are merely "invited" to accept the state's funds and any resulting costs are no more than the results of the school district's voluntary decision to participate.

The trend of the law today is away from the "shall" versus "may" legal compulsion arguments favored yesterday. The California Supreme Court has held that the determination of whether a program is truly voluntary depends upon (1) the nature and purpose of the program, (2) whether the program's design evidences an intent to coerce, (3) the penalties assessed for non-participation, and (4) the legal and other practical consequences of non participation. City of Sacramento v. State of California (1990) 50 Cal.3d 51, 76. The concept of state mandate is sufficiently broad to include situations where the local school district has no reasonable alternative to the state scheme or no true choice but to participate in it.

In the instant case, the legislature has designed a plan to award schools and teachers financially for academic improvement. It has offered substantial awards

to teachers and large sums of money to school districts for academic performance. The DOF and CDE offer an argument that says districts need not file an application that would result in monetary awards for their teachers (up to $25,000 per eligible teacher) and needed funds ($350 million dollars for the Academic Performance Index Schoolsite Employees Performance Bonus, alone) for your schools. Employees and their "exclusive representatives" know about these programs and funds and districts would be fiscally irresponsible to turn down these sources of funds.

In conclusion, the responses of the DOF and the CDE should be ignored as legally incompetent for their failure to comply with Section 1183.02 of Title 5, California Code of Regulations; they are legally and factually incorrect; and the test claim should be approved for the reason that school districts have no reasonable alternative or no true choice but to participate in each of the programs set forth in the test claim.

CERTIFICATION

I certify by my signature below, under penalty of perjury, that the statements made in this document are true and complete to the best of my own personal knowledge or information and belief.

Sincerely,

Keith B. Petersen

C: Per Mailing List Attached

Commission on State Mandates

Original List Date: 7/3/2002 **Mailing Information** Completeness Determination

Last Updated: 07/05/2002

List Print Date: 07/08/2002

Mailing List

Claim Number: 01-TC-22

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